man conductor took hold of plaintiff's arm when he rose and aided the plaintiff in passing along the aisle and in crossing the platform of the cars, but the evidence does not show that he used or exercised any force whatever. Even if he had used force upon the plaintiff, he was not doing the business of the defendant company —he was assisting the train conductor in the duty he was performing as servant of the railroad. To conduct him across from one car to another, in the manner described by plaintiff himself, after he had repeatedly refused to leave the car, affords no evidence of any removal in an improper manner. The act of defendant's servant was in every way calculated to assist plaintiff in his transit from one car to another.

Nor is the fact that the car into which the plaintiff was passed subsequently became cold, important, even if it were possible to hold the defendant responsible for the act of its servant. So far as appears by the evidence, there is no reason to believe that when plaintiff entered the car it was not in fit condition to receive passengers, and the management of it was entirely with the railroad company, and not the defendant.

Judgment on the verdict for defendant.

The above case is an important addition to the literature upon the important subject therein discussed. The reasoning of the court is so clear and conclusive that citation of authority is unnecessary.

M. D. EWELL.

Chicago.

Supreme Court of California.

CONNER *v.* STANLEY.

As an abstract proposition, a belief in spiritualism does not prove insanity. But a person may be a monomaniac on that subject, or on any form of religion.

The rule that a person who occupying a confidential relation receives a benefit, has the burden of proving the absence of undue influence, applies with peculiar force where the beneficiary is the priest, confessor, clergyman or spiritual adviser of the benefactor, and with no less force where the parties are a believer in spiritualism and a professed medium.

APPEAL from the Superior Court of Sacramento county.

Robert T. Devlin, *W. H. Beatty* and *A. P. Catlin*, for appellant.

Freeman & Bates, for respondent.

The opinion of the court was delivered by

TEMPLE, J.—The contract on which this action is founded is set

out in full on the former appeal (65 Cal. 184). It is there said to be valid as an ante-nuptial contract. The defendant set up as a defence that at the time the alleged contract was made his intestate was insane and incapable of entering into a contract, and that it was procured by the use of undue influence by the plaintiff.

The court found that all the allegations of the complaint were true, except as to the capacity of Jarvis to contract; and that all the affirmative matters set up in the answer were true, except that plaintiff and P. B. Nagle did not, nor did either of them, coerce Jarvis otherwise than by taking advantage of his weak and unsound mind. The findings, therefore, plainly cover all the issues in the case, and the only question for our consideration is, whether there is any evidence which could justify the conclusion? Upon this proposition there can be no doubt.

1. There was evidence tending to prove insanity generally, and not merely that he was insane on the subject of spiritualism. J. Miller, an intimate acquaintance, thought he was insane. To the same effect is the testimony of Mrs. A. Walker, J. W. Houston, S. B. Lusk and Lee Stanly; and it is shown that plaintiff herself stated that she believed him insane. And then there is much testimony as to facts which would tend to show an unsound mind.

2. There is much testimony tending to prove that Jarvis was insane on the subject of spiritualism. That there is such evidence is not controverted, but counsel indulge in a long argument, and cite many authorities to the point that a belief in spiritualism does not prove insanity. As an abstract proposition no doubt this is so. The law pronounces no one insane for mere religious belief, no matter how unreasonable it may appear to the judge. But this does not meet the case made. A belief in the doctrines maintained by the Methodists, Presbyterians or the Catholics would not establish insanity. Still, one might be a monomaniac as to either form of religion, and so as to spiritualism. And that is precisely the effect of the great mass of testimony in this case.

3. There is much evidence tending to show undue influence. It is established that the relation between the parties was confidential, in consequence of her claim to power as a medium, through which she had great control over him. This being established, the burden was cast upon her of showing that there was no undue influence. The rule applies with peculiar force to the relation of one and his priest, confessor, clergyman or spiritual adviser, and certainly with

no less force to the relation between one who is a firm believer in, not to say a monomaniac upon the subject of, spiritualism, and the medium in whom he has confidence and upon whom he habitually relies. The cases upon the subject are numerous, but the law, so far as necessary here, is crystallized in the Civil Code. Section 2219 provides that every one who voluntarily assumes a relation of personal confidence with another is a trustee, and sect. 2235 raises the presumption that all transactions between such persons, by which the person trusted obtains an advantage, are entered into under undue influence. It becomes important, then, to inquire whether the relation did exist.

Jarvis was seventy-two years old, feeble, both mentally and physically. He was a widower, his wife having died in August 1881, a few months before the contract questioned here was entered into. He had lived for a great many years at Folsom a quiet life, with no family except his wife. They had had one child, a daughter, who married the defendant, and died twenty years ago, leaving two children. Jarvis had been a music-teacher, and had accumulated some property. He was for many years a firm believer in spiritualism. The belief had grown upon him until, in the opinion of the witnesses, it had become a monomania. His mind would drift to the subject upon all occasions. He relied upon supposed spiritual advice in his business transactions. When warned against trusting certain persons, he said: "It will be all right in the next world; they are spiritualists." He sold a farm for $2000, to be paid for in instalments of $200 a year, without interest. He had been offered $250 a year rent. He said the spirits told him he must sell; that he was governed entirely by the spirits. The purchaser was a spiritualist. He invested several thousand dollars in mines, under the supposed advice of spirits. Most of this money was lost. He offered a lady $1500 to attend seances and become a medium. To another lady he offered to convey a piece of land if she would become a medium. He believed he could reform all the convicts if he could get them to read a spiritualistic paper. He said he had got the right idea of spiritualism, and was going to publish a work which would astonish the world. He admitted that he was controlled by mediums.

One witness said he was a mental wreck from the time he lost his daughter, and there is much evidence that he became still worse after the death of his wife. His conduct was very strange during

her last illness. He did not believe in giving her medicine or nourishment. The medium said she would die and the spirits would keep her until then. He did not wish a doctor, as the spirits would do nothing if he had one. He objected to cooking being done in the house, the smell would keep the spirits out. The doors and windows must be left open so they could come in. He was angry when they gave her stimulants, because if she were to die intoxicated she would remain so in the spirit land. He knew of one man who was killed while drunk, and who was still drunk fifteen years after his death.

In this condition of health, mental and physical, Jarvis met the plaintiff. She is said by her counsel to be an artist, who has a studio in San Francisco; a highly educated, refined and accomplished lady. When Jarvis first made her acquaintance does not definitely appear, but it was evidently shortly after the death of his wife, when he went to consult her as a medium to find out how much money he should give his granddaughter to use. In February, after Mrs. Jarvis's death, plaintiff was giving seances at Folsom. Jarvis had induced her to go there to be developed as a medium, and gave her fifty dollars per month to come. She remained on these terms for some three months, giving seances, which were attended by Jarvis, and to which he invited his friends. The evidence shows that he had the most exalted opinion of her powers as a medium, and that he was much under her control. He said himself that she had great influence over him when she was around. There is evidence that plaintiff herself said that she believed that Jarvis was crazy, and a medium could do anything in the world with him.

We think this is sufficient to show that there was evidence upon which the court could find the existence of a relation of a peculiar trust and confidence between them, similar to that between a religious devotee and his spiritual adviser, and the proof of which would throw upon the plaintiff the burden of showing fair dealing.

But the record contains evidence of undue influence and adverse pressure. Mrs. Wallace testified: "Speaking of the time when the contract that is in suit here was executed, she said that they had had trouble and had words. She said that she wished him to settle something on her, and he asked her if she was afraid that he would not leave her anything, or would not leave her as well off as her other husband had left her, and she said that she locked the door

and kept him in the room for about two hours, and that she put the key in her pocket. * * * They talked about the matter in my presence, and they both told me that which I have stated. She said that they finally came to a settlement, and he agreed to settle something on her, and she opened the door and got a boy and sent him down to Nagle's office, and he came up and drew a draft of the contract that day, and the next day she told me that Jarvis came in and she asked him if he would have a chair, and she said he acted queerly. Then she said that she told him he would not have time to sit down if he was going down to keep his word and sign that contract. He asked her what contract, and he said I have made no contract. * * * She said that at that time he acted as if he was either drugged or crazy, and that he did not act as if he knew what he was about, and did not seem to know that he had ever drawn up a contract. * * She expressed herself as believing that he was an old fool and did not know what he was about. She said at that time she believed that he was crazy."

There was evidence on the part of the plaintiff contradicting some of this evidence, but this only creates a conflict. If we could consider the testimony, however, as a trial court, we could not say that the evidence does not sustain the finding.

Judgment and order affirmed.

The decision of the court turns on the point that there was sufficient evidence to sustain the findings of the court. But it involves also in some measure the question of the capacity of a party to execute a contract with another where one or both are believers in spiritualism.

A very interesting case, in which the question of how far a belief in spiritualism affects the power of a party to execute a contract or will, is *Chafin Will Case*, 32 Wis. 557, 560. In that case, LYON, J., in delivering the opinion of the court, thus states the facts: "We pass at once to consider whether the evidence is sufficient to sustain the finding of the jury that Chafin was of unsound mind when he executed the instrument purporting to be his last will and testament. Taking the testimony most strongly in favor of the contestants, the claim that the deceased was of an unsound mind when he executed that instrument is based upon certain peculiarities in his opinions, character and conduct, which may be briefly stated, as follows:

"1. He had faith in the statements of professed clairvoyants, fortune tellers and spiritual mediums, and through the influence of one, or all of these, he was induced to make journeys to New York, Pennsylvania, Michigan and Iowa, in search of mines and hidden treasures, which, of course, he never found. He also intimated his belief in witchcraft to one of the witnesses.

"2. He sometimes professed to live without committing sin. He was a man of high temper and strong prejudices, was very positive and firm in asserting and maintaining his opinions, and exceedingly intolerant toward those who did not agree with him in sentiment, especially on political and religious subjects.

He once attempted to shoot a man who, he claimed, persisted in carrying off his wood, and when prosecuted for it and bailed, said that had he been sent to prison he would have concealed himself in a grove and shot the justice.

"3. He had many peculiar notions on mechanical and scientific subjects. He once thought that he could invent a machine or instrument, which would indicate the location of mineral deposits, and tried to do so. He attempted persistently to invent or discover perpetual motion, or rather some instrument or apparatus having that quality. He believed that he could invent torpedoes, and perhaps other engines of war, with which the rebel fleets and armies might be speedily destroyed, and he addressed President Lincoln on the subject. He denied that the earth revolved on its axis, but insisted that the sun revolved around the earth, and presented arguments to sustain his theory. He also denied the correctness of the computations of astronomers to determine the distance from the earth to the sun. He thought that rain could be produced by concussion of the atmosphere caused by the firing of cannon, and he urged arguments in support of this theory also. He owned two small cannon, and offered to bring on rain in a dry time by firing them, if his neighbors would buy the powder, but they refused to do so, and the theory does not seem to have been subjected to an actual test. He had a taste for possessing firearms. Besides his artillery, he owned a rifle and a shot-gun, and on extraordinary occasions, as on his birthday anniversary, or that of his wife, on election days, Fourth of July, and the like, he would frequently fire his artillery by way of celebrating the occasion.

"4. He believed that his former wife, from whom he had been divorced, was unfaithful to him, and insisted that he was not the father of her youngest child, who was born while he lived with the mother. He disliked all his children, and frequently denounced them as transgressors, and entirely unworthy of his bounty. About two years before his death he stated to a witness that he once staid at the house of one of his sons-in-law, and heard the family up nearly all night, and that he feared they thought he had money and that they might kill him. On the other hand it appears that wherever he had the opportunity to bring any of his peculiar notions to a practical test, if the test failed to establish the correctness of his views, he quite readily abandoned them. Thus, after his return from his various journeys in search of mines and hidden treasures, he admitted his failure, and for the last five or six years of his life we hear nothing from him on these subjects. Then again, when he failed to discover minerals by the use of the machine or apparatus which he invented for that purpose, which was fifteen years or more before his death, it does not appear that he ever alluded to the subject afterwards. It was also abundantly proved that his judgment upon business matters was sound; that he was industrious and frugal, a good farmer and a close, careful trader. He had a great desire to amass a fortune, and did acquire considerable property before his death. He was not a very liberal or generous man, yet he was strictly honest in all his dealings. From these data we are called upon to determine the mental condition of the deceased at the time he executed the instrument purporting to be his last will and testament. It may be observed at the outset, that his various traits of character were so strongly marked, it does not seem difficult to determine from the evidence 'what manner of man he was.' A person of merely negative qualities may pass through life, and little comparatively be known of him by the community in which he has lived, and it may be very difficult to delineate accurately the character of such person. Not so, however, with his opposite. The man of positive

character and strong convictions, who freely utters his sentiments on all subjects, and gives unrestrained expression to every emotion, 'may be known and read of all men.' Bradley Chafin (as he was familiarly called) belonged to the latter class. He was a man of most positive character, and was entirely unreserved in the expression of his opinions and feelings. His mind was active but undisciplined, and he was visionary and illogical. He was an independent, and to some extent an original thinker. He possessed great self appreciation, but seemed to be quite indifferent to the opinion of others concerning himself; as the professors of phrenology might express it, he had large self-esteem and small love of approbation. He loved wealth, and having some inventive mechanical genius, thought that he could amass a fortune by means of some wonderful invention. Hence his apparatus to discover the location of bodies of mineral in the earth, and his attempts to solve the problem of perpetual motion. He was credulous, and perhaps superstitious: hence his ready belief of the clairvoyants and mediums who ministered to his love of wealth by pointing out to him an easy method of obtaining it. Hence also his belief in dreams which seemed to indicate to him the location of mines and hidden treasures. He was suspicious and jealous, which may account for his fears on one occasion that his relatives might take his life, and also his attacks upon the character for chastity of his former wife, and his denial of the legitimacy of one of her children. Evidently he never formed any very strong domestic attachments, and his conjugal and paternal feelings were not sufficiently powerful to save his wife and children from the consequences of his jealousy, his credulity, and his violent, implacable temper. Such was Bradley Chafin. It would be more agreeable could his mental portrait be truthfully painted in softer colors. But all that can be done in that direction is to give due prominence to that redeeming trait to his character, his strict integrity in business affairs."

The jury and lower court found him to be insane. But the Supreme Court reversed the judgment of the circuit court, on the ground that the verdict was clearly contrary to the weight of evidence. Said the court, commencing on page 563: "But does all this demonstrate that the deceased was insane? Ignorance, superstition, jealousy, avarice, self-conceit, violence of temper, unjust hatred of wife and children, may each and all, under certain circumstances, be consistent with the condition of sanity. These may all be accounted for on the hypothesis of temperament and defective education, excluding entirely the hypothesis of insanity. Because Bradley Chafin had many peculiarities of character, because he entertained opinions which were generally deemed absurd and extravagant, and because his conduct in some respects was eccentric and foolish, we must not, without further reflection, conclude that he was insane. We must carefully examine these alleged evidences or *indicia* of insanity, and ascertain, if we can, whether they do in fact prove that he was insane when he executed the instrument which purports to be his last will and testament. As already intimated, there is not one of these alleged indications that the deceased was insane, which, when considered independently of the others, is not entirely consistent with the hypothesis of sanity. Certainly there are numerous people whose sanity is undoubted, who believe in the supernatural, and who trust as implicity in the prognostications of fortune-tellers, clairvoyants, and spiritual mediums as the deceased ever did, and who also have faith in dreams, and believe in the existence of witches, and in the possibility of perpetual motion as applied to machinery, and of inventing instruments by which mineral deposits may be discovered. Dr. Carver, a very intelligent medical

witness, who had been in the western mines, testified as follows: 'I have seen hundreds of men in the mountains, who came there on dreams, including lawyers, doctors and priests. Belief in clairvoyance is a common thing. Business men here in Monroe have been and searched for minerals under the direction of clairvoyants. Dreams are laid down in books under the head of eccentricities.' There are also large numbers of men of perverted domestic feelings, who hate their wives and children without just cause, or who are violent and bad-tempered, or who cherish the most exalted self-conceit, or who profess to live without sin, or who reject as false the plainest demonstrations of science and adopt as true, the most absurd theories, and yet, who are not insane. Such opinions and mental qualities are not, therefore, of themselves, evidence that their unfortunate possessor is insane, although they may be very absurd, and may lead a man to do many absurd and objectionable acts. The opinions and feelings of the deceased which at first view might seem to indicate insane delusions, are those relating to his family. But an examination of the circumstances will show, we think, that even these fail entirely to establish the existence of any such delusion. So far as the imputations on the chastity of his former wife, and the denial of the legitimacy of the daughter are concerned, there is really no evidence showing whether the imputation was true or false. The presumption is that it was an unfounded imputation. But we are entirely ignorant of the ground of Chafin's opinion. It may have been based upon facts and circumstances which would have controlled a better-balanced mind than his. It will not do to find the existence of insane delusion in the mind of Chafin without some proof of the fact. As to his alienation from his children, the evidence is that his son entered upon a criminal course of life, and was sent to the state prison of Illinois for some offence; that Chafin had serious trouble with all three of his daughters, about business matters, after he was divorced from his first wife; and that the feeling between him and his daughters was mutually unkind and even bitter. Of course, whether Chafin was or was not to blame for becoming alienated from his children, we find in the fact of such alienation a reason, entirely foreign from the influence of insane delusion, why he disinherited them. His idea in relation to torpedoes and other implements of war were entertained at a time when much attention was given to those subjects, and many experiments were being made, and it is no evidence of delusion that his active, visionary and inventive mind was turned in the same direction. Hence we find ourselves unable to point out any single opinion of the deceased, however erroneous, or any action of his, however absurd and unusual, which we can say was the result of insanity or delusion produced by insanity.

"Having examined the alleged *indicia* of insanity separately, let us now briefly consider them collectively, and apply to them a few tests recognised by science, and approved by the judgment and experience of mankind in general, in order to ascertain whether they are really indications or proof of insane delusions.

"1. As a general rule, the insane or partially insane, do not reason upon the subjects of their hallucinations or delusions. But the peculiar opinions and conduct of Bradley Chafin were the results of processes of reasoning. He argued against the theory of the revolution of the earth by asserting that if a body be projected upwards perpendicularly from the earth, it would fall in the place from whence it was projected, which he claimed could not occur if the earth revolved on its axis. His premise was correct, but his conclusions therefrom erroneous. He believed in witches doubtless because his Bible told him that

they existed in ancient times, and he could see no good reason why they should not exist now. His theory of an apparatus to disclose the location of mines was based upon the idea that like attracted like; hence, in the construction of the same, he used the kind of mineral which he hoped to find. His idea that concussion of the atmosphere would cause rain to fall had, for its foundation, the fact which he believed to be well attested, that heavy rainfalls accompanied or followed immediately after great battles. When he fancied that there was danger, on a certain occasion, that the family of his son-in-law might kill him, it was because he claimed to have heard them up at an unseasonable hour of the night, and he thought they might be prompted by avarice to take his life.

"2. Generally it is impossible to convince the insane of the absurdity of their delusions by any arguments or actual tests, however conclusive they may be to a person of sound mind. It has already been remarked that whenever Chafin put any of his peculiar notions to a practical test, and found that the test failed to demonstrate the correctness of his views, he freely admitted the failure, and apparently abandoned the notion. Instances of this kind are mentioned above.

"3. The really insane are usually subject to sudden changes from one delusion to another. True this does not always happen, but where the patient is suffering under a settled, long continued delusion, there will seldom be any difficulty in ascertaining whether it is really an insane delusion or merely an erroneous opinion based upon false reasoning or insufficient evidence. If a man really believes he is made of glass, or that he is the Christ, or that he is dead and persists in the opinion, we readily conclude that he is the victim of hallucination or insane delusion, because such opinions are inconsistent with the condition of sanity. *But we can draw no such conclusion from the mere belief in witches, ghosts, dreams, spiritual manifestations, or in strange and absurd views on scientific or religious subjects,* because such opinions are consistent with sanity. We must find stronger evidences than these of a diseased mind, before we can pronounce the man insane who believes in these absurdities.

"There is no evidence to indicate any great changes in the character or opinions of Bradley Chafin. The testimony covers a period of about twenty of the last years of his life, but it fails to disclose in him any of the ordinary and usual changes and freaks of insanity. If his eccentricities and peculiar opinions were really the results of insane delusions, he was strangely persistent in them, never yielding his opinions except upon absolute proof that they were wrong. What he was in 1850, that was he in 1870. Once having conceived a dislike for his former wife and her children, such dislike continued to the end of his life. If he abandoned an opinion, it was because its soundness or unsoundness admitted of actual demonstration, and he had proved it to be erroneous. Opinions not susceptible of such demonstration he never abandoned. If he embraced a new belief, it was clearly referrable to some preconceived theory which he believed. In a word, he was always consistent with himself, and his opinions and conduct seem to have been the natural and logical results of his character, disposition and temperament."

Where one was a firm believer in spiritualism, and acted in business affairs on the communications of mediums, it was held that he was, notwithstanding, of sound and disposing mind: *Smith's Will*, 52 Wis. 543. Mere eccentricity of mind manifesting itself in erroneous, foolish and absurd opinions on certain subjects, does not constitute insane delusion, and is not of itself evidence of insanity: *Thompson* v. *Thompson*, 21 Barb. 107. Where a testator believed in witches, devils and spirits, which he

fancied tormented him, lived in a strange and brutish manner, wore an extraordinary dress, slept in a hollow gum-log, made strange bargains and exhibited innumerable extravagances, but was able in other respects, to manage his affairs, his will was pronounced valid: *Lee* v. *Lee*, 4 McCord 183.

Where a testator had habitually spoken of his kept mistress, who had died before him, as having been a person of deep religious opinions, the fact of the possible existence in his mind of a deluded opinion upon this subject, was held to be no evidence of his want of capacity, since no opinion upon moral matters, however absurd, will of itself constitute an insane delusion: *Ditchburn* v. *Fearn*, 6 Jur. 201.

So the fact that a testator was eccentric, exaltable, passionate and very nervous, was on certain subjects believed by many to be insane through excited feeling; that he believed in spiritualism, the book of Mormon, or in Fourierism; talked very much like a fool; had visions, and believed in them—is not enough to show a want of sound and disposing mind and memory, provided he attended constantly to his business, and managed it with capacity, care and skill, and in other practical respects appeared to be of sound mind: *Turner* v. *Hand*, 3 Wall. Jr. C. C. 88, 103.

Where it appeared that a testator was of strange and eccentric habits and manner; had an extraordinary way of expressing himself; seemed to believe that one of his relatives had been murdered by poison, and that there was a scheme in existence to poison himself, and used extraordinary precautions against it—it was held that though the deceased was eccentric he was not deranged; that he had not in his mind any morbid delusion irresistibly overbearing his reason, and that he was possessed of testamentary capacity: *Walcott* v. *Alleyn*, Milw. 65. A belief that the souls of men after death pass into animals is no proof of insanity: *Bonard's Will*, 16 Abb. Pr. N. S. 128. See also further authorities: *Weir's Will*, 9 Dana 440; *Gass* v. *Gass*, 3 Humph. 278.

In *Bonard's Will*, 16 Abb. Pr. N. S. 128, the testator was a firm believer that the souls of men after death passed into animals. The court said: "It appears to me that, if a judicial officer should assume that merely because a man earnestly believed in that doctrine, he was insane, or labored under an insane delusion or monomania, incapacitating him for making a will, if prompted by that faith, but, though consistent with it, wholly rational in its provisions, it would not fall very far short, in principle, of assuming that all mankind who do not believe in the particular faith which the judge accepts, respecting the future state, are more or less insane, or the victims of an insane delusion. This question is entirely within the domain of opinion or faith, and not of knowledge. A man may properly be assumed insane upon evidence that he is governed by hallucinations which are *physically* impossible to the knowledge of all sane men, and which are contrary to the evidence of the *senses*, or who is influenced by delusions, which are the creation of diseased reflective faculties. Hence the opinion as to a future state, of which no man has positive knowledge, and, in regard to which mankind have always differed, and do widely differ to-day even in the most civilized countries, and among the most intellectual men, cannot, in any respect, be deemed evidence of insanity, the only rule by which the insanity of one of certain opinions can be determined being by some test, founded on positive knowledge.

The insanity of an opinion must be established only with reference to means of knowledge accessible to men of common minds and understanding, and not upon the results of profound scientific researches or experiment, or scholastic theology, or religious tenets, concerning the nature of the infinite, or the destiny

of the race beyond the present, which itself is too vast and mysterious a domain for the finite mind to comprehend; and, if we are so much at fault, or deficient, and so at variance, in opinion of the truth of the present, how can we presume to hold one insane as to our nature and destiny in the future? Moreover, if a court is to ascribe insanity to a man, or a class of men constituting a sect, on account of his or their opinion or belief as to a future state, and a particular sect had in fact attained to a real knowledge of that future, the logical deduction would necessarily be that a major portion of mankind, comprised in all other and different sects, were of unsound mind or monomaniacs on that subject. If it be the case that such knowledge has been so attained by a sect or known body of believers, the question remains which it is, and what tribunal is to exercise the judgment of determination."

An insane man may ratify his contract and his ratification may be inferred: *Arnold* v. *Richmond Iron Works*, 1 Gray 434; *Eaton* v. *Eaton*, 8 Vroom 503; *Tucker* v. *Moreland*, 10 Pet. 64.

To set aside a contract made on a valuable consideration, the sane party must have had notice of the other's insanity: *Ashcroft* v. *DeArmond*, 44 Iowa 229; *Campbell* v. *Hill*, 22 U. C. C. P. 526; 23 Id. 473.

"The law does not attempt to determine the degree of intelligence that parties must possess to bind themselves by contract. A party is presumed to have legal competency to contract when he is in the possession of mental capacity, sufficient to transact business with intelligence and an understanding of what he is doing. Persons who have lost their memory and understanding by old age, sickness, or other accident or infirmity, to such a degree that they are rendered incapable of transacting their business and of managing their property, are considered to be of unsound mind. A deed may be avoided on the ground of insanity, when the grantor did not possess sufficient strength of mind and reason to understand the nature and consequences of his act in executing it, and by its execution he does not make it his deed, if at the time, he was from weakness of mind incapable of understanding it if explained to him. But although it may be uncertain that the mind of the grantor was in all respects sound, still, if he has sufficient ability to execute and deliver a deed, understanding the consideration he is to receive, and the nature of the transaction in transferring his title to another, it is considered that his mind is sufficiently sound to render his deed valid:" 1 Devlin on Deeds, sects. 67, 68.

The grantor is to be deemed sane if he has sufficient mental ability to comprehend what he is doing and to understand the nature of his act: *Wright* v. *Jackson*, 59 Wis. 569; 1 Devlin on Deeds, sect. 69.

Mere nervous excitement existing in the grantor's mind at the time of the execution of the deed will not invalidate him: 1 Devlin on Deeds, sect. 70.

For the purpose of showing insanity, evidence as to the condition of a party's mind immediately before, at, and after the execution of the contract or conveyance is admissible: *Peaslee* v. *Robbins*, 3 Met. 164; *Grant* v. *Thompson*, 4 Conn. 203; 10 Am. Dec. 119; *Dickinson* v. *Barber*, 9 Mass. 225; 6 Am. Dec. 58; *Watson* v. *Anderson*, 11 Ala. 43; *Hendrix* v. *Mooney*, 1 Bush 306.

But evidence cannot be admitted to show insanity at remote periods before or after the making of the conveyance: *Harden* v. *Hays*, 14 Penn. St. 91.

A deed will not be avoided on account of the mere mental weakness of the grantor, if such weakness does not amount to inability to comprehend the contract and there is no evidence of undue influence or imposition: *Miller* v. *Craig*, 36 Ill. 109; *VanHorn* v. *Keenan*, 28 Id. 488; *Aiman* v. *Stout*, 42 Penn. St. 114.

The deed of an insane person not under guardianship transfers a seisin, and is merely voidable; and if executed during a lucid interval, it cannot be successfully assailed on the ground of the anterior or subsequent insanity: 1 Devlin on Deeds, sect. 73; *Riggan* v. *Greene*, 80 N. C. 236; *Breckenridge* v. *Ormsby*, 1 J. J. Marsh. 236; 19 Am. Dec. 71; *Cates* v. *Woodson*, 2 Dana 452; *Ingraham* v. *Baldwin*, 5 Seld. 45; *Arnold* v. *Richmond Iron Works*, 1 Gray 434; *Allis* v. *Billings*, 6 Met. 415; 39 Am. Dec. 744; *Freed* v. *Brown*, 55 Ind. 310; *Jackson* v. *Gumaer*, 2 Cowen 552; *Crouse* v. *Holman*, 19 Ind. 30; *Price* v. *Berrington*, 3 Macn. & G. 486; *Desilver's Estate*, 5 Rawle 111; 28 Am. Dec. 645; *Bensell* v. *Chancellor*, 5 Whart. 376; 34 Am. Dec. 561; *Beals* v. *See*, 10 Penn. St. 56; 49 Am. Dec. 573; *Seaver* v. *Phelps*, 11 Pick. 304; *Thomas* v. *Hatch*, 3 Sum. 170; *Key* v. *Davis*, 1 Mo. 32; *Eaton* v. *Eaton*, 8 Vroom 103; *Somers* v. *Pumphrey*, 24 Ind. 231; *Tucker* v. *Moreland*, 10 Peters 58; *Harden* v. *Hays*, 14 Penn. St. 91.

A deed may be rescinded by the grantor himself when restored to reason, or by his executor, administrator, committee, guardian or his heirs: *Key* v. *Davis*, 1 Md. 32; *Judge of Probate* v. *Stone*, 44 N. H. 593; *Campbell* v. *Kuhn*, 45 Mich. 513; *Cates* v. *Woodson*, 2 Dana 452; *Brown* v. *Freed*, 43 Ind. 253.

But strangers and persons who are merely the privies in estate of the grantor have not the right of avoiding a voidable deed: 1 Devlin on Deeds, sect. 75; *Kibbe* v. *Myrick*, 12 Fla. 419; *Breckenridge* v. *Ormsby*, 1 J. J. Marsh. 236, 248; 19 Am. Dec. 71. But see *Thomas* v. *Hatch*, 3 Sum. 170.

"There is not an unanimity of opinion on the question as to the necessity of restoring the purchase-money and placing the grantee in the same position that he occupied before the execution of the deed, in cases where the grantee acted without notice of the grantor's insanity and in good faith. On the one hand, it is held in such a case, the grantee should receive what he has paid out, before a deed made to him acting in good faith by an insane grantor should be set aside. But on the other hand, it is held that the right of avoidance exists against *bona fide* purchasers without notice, and that no previous offer of restitution is necessary. The true rule would seem to be that only in cases of fraud should the deed be set aside without return of the consideration, but in cases where the deed was taken in good faith, the grantee should be remembered:" 1 Devlin on Deeds, sect. 76.

The suggestion of mere weakness or indiscretion in the contracting party is not sufficient to set aside a conveyance on the ground of undue influence. It must also be shown that undue means were used to control that weakness. Though fraud may be shown, it does not follow, in equity, as a necessary consequence, that a conveyance must be set aside absolutely. Effect may be given to it by allowing it to remain as security for whatever amount may have been actually due by one party to the other: *Anthony* v. *Hutchins*, 10 R. I. 165.

"Deeds made under undue influence, like those obtained by duress, are voidable. Influence exerted over a grantor to such a degree as to deprive him of the exercise of his will, is in equity, considered a fraud, and a conveyance obtained thereby will be set aside. The burden of proving undue influence is upon the person alleging it; and as each case must for the most part be decided by its own peculiar circumstances, the relations between the parties should be taken into consideration in determining whether the grantor was acting under undue influence. Less evidence is necessary to establish the use of undue influence, to obtain the execution of a deed, when relations of trust and confidence, as parent and child, guardian and ward,

trustee and beneficiary, attorney and client, physician and patient, nurse and invalid exist, than might be required in other cases :" 1 Devlin on Deeds, sec. 84.

Judge FIELD says that it may be stated as settled law, " that whenever there is a great weakness of mind in a person executing a conveyance of land, arising from age, sickness, or any other cause, though not amounting to absolute disqualification, and the consideration given for the property is grossly inadequate, a court of equity will, upon proper and seasonable application of the injured party, or his representatives or heirs, interfere and set the conveyance aside :" *Allore* v. *Jewell*, 94 U. S. 506, 511.

A leading case on the subject of the avoidance of contracts between a believer in spiritualism and a professed medium is *Lyon* v. *Home*, L. R., 6 Eq. 655.

Other cases to like effect are *Nottidge* v. *Prince*, 2 Giff. 246, and *Thompson* v. *Hawks*, 14 Fed. Rep. 902.

ROBERT T. DEVLIN.

Sacramento, Cal.

Supreme Court of Ohio.

BARHOLT *v.* WRIGHT.

It is no defence to an action for assault and battery that the acts complained of were committed in a fight engaged in by mutual consent, although such consent may be shown in mitigation of damages.

A civil action for assault and battery may be maintained although the assault and battery were committed in the course of a fight engaged in by the mutual consent of plaintiff and defendant. The fact that the fight, in which the injuries complained of, took place, was by consent, can be shown in mitigation of damages.

ERROR to Circuit Court, Portage county.

Action for assault and battery. The evidence showed that plaintiff and defendant went out to fight by agreement, and did fight, and plaintiff was severely injured; one of his fingers being so bitten, among other things, that it had to be amputated. The court charged that, if the parties fought by agreement, plaintiff could not recover, and a verdict was returned for defendant. Upon error to the Circuit Court a new trial was ordered; defendant now brings error to reverse that order.

P. B. Conant and *J. H. Nichols*, for plaintiff in error.

W. B. Thomas and *Geo. F. Robinson*, for defendant in error.

The opinion of the court was delivered by

MINSHALL, J.—It would seem at first blush contrary to certain general principles of remedial justice to allow a plaintiff to recover damages for an injury inflicted on him by a defendant in a combat of his own seeking; or where, as in this case, the fight occurred